85-269

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

JOHN CALVIN NABORS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether society is prepared to recognize as legitimate the expectation of privacy of a third person guest or invitee on the premises of another when the police entry is directed at both of them, thereby giving the third person standing to challenge the police entry under the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (App.A, infra, 1a-20a) is reported at 761 F.2d 465. The opinion of the district court denying petitioner standing to challenge the search is unreported. (App.C, infra, 22a-26a)

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1985. A petition for rehearing en banc was denied on June 18, 1985. This petition is filed within sixty days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment to the U.S. Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Procedural history

Petitioner was convicted by a jury in the U.S. District Court for the Eastern District of Arkansas of conspiracy to possess meperidine with intent to deliver in violation of 21 U.S.C.

§ 846, distribution of meperidine in violation of 21 U.S.C. § 841(a)(1), and possession with intent to distribute hydormorphone, meperidine, methadone, and secobarbital in violation of 21 U.S.C. § 841(a)(1). Petitioner was sentenced to a total of twenty years, with a special parole term of five years, and fined $15,000.

Petitioner filed a motion to suppress evidence seized from his person at the time of his November 29, 1982 arrest[1] in the premises of Gena Preston, his former codefendant, who was granted immunity in exchange for her testimony. These drugs made up the bulk of the case against petitioner (all but one count). They originally filed a joint motion to suppress. After Preston became a Government witness, petitioner supplemented his motion and alleged he had a separate reasonable expectation of privacy in her premises because he was there with her as her guest. Therefore, he alleged he had standing to

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1. The grounds alleged in the motion are in note 6, infra.

challenge the search. The Government countered that petitioner lacked standing to challenge the search because he lacked any interest in the premises.

After a hearing on the motion to suppress in the district court, the court held that petitioner lacked standing to challenge the search of Preston's premises because he "possessed no proprietary interest in or to the property, nor any other interest of any type, kind or nature" (App.C, infra, at 23a) and that he failed to demonstrate that he had a reasonable expectation or legitimate expectation of privacy [in Preston's] residence . . . during the search and seizure." (Id. at 24a)

The evidence was admitted at trial and petitioner was convicted on January 21, 1984.

The U.S. Court of Appeals for the Eighth Circuit affirmed petitioner's conviction and the trial court's holding that petitioner lacked a reasonable expectation of privacy in Preston's residence even though: (1) he was there with her

permission for a conspiratorial purpose to benefit both of them, (2) he had visited her many times in the past, and in fact was maintaining a meritricious relationship with her because he was married to someone else, (3) Preston shut the door behind him and locked it and drew the window curtains so no one could see in while they inventoried the drugs on the dining room table, and (4) they had a "subjective expectation of not being discovered" which was found not to be an expectation of privacy in the premises. United States v. Nabors, 761 F.2d 465, 468-70 (8th Cir.1985); App.A, infra, at 10a-14a.

Petitioner's petition for rehearing and rehearing en banc was denied.

B. Relevant Facts

As did the court of appeals, we summarize the facts in the light most favorable to the jury verdict. Hamling v. United States, 418 U.S. 87

(1974).[2]

On November 22, 1982, the North Little Rock Memorial Hospital pharmacy was robbed by three masked men who took large quantities of controlled substances including meperidine, hydormorphone, methadone, secobarbital, and pharmaceutical cocaine. Preston testified that petitioner showed up at her house at a time that would have been the night of that robbery and shared with her what he said was some pharmaceutical cocaine.

Aside from their adulterous relationship, petitioner and Preston had, in the words of the court of appeals, "an on-going drug dealing relationship." According to Preston, petitioner would "front" drugs to her. That is, he would bring drugs to her for her to sell, and she would pay him for the drugs after she sold

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2. Appellant disputes the facts found concerning the conspiracy because they were based largely on Preston's immunized testimony. Nevertheless, he must accept the fact of the jury verdict and what it means.

them. The night they shared the cocaine, petitioner discussed bringing more drugs to her to sell.

According to Preston, petitioner brought over tubexes (premeasured dosages) of meperidine the day following the robbery which she sold to her brother and one John Drake with whom she had an on-going drug dealing relationship where she both bought and sold drugs.

Meanwhile, John Drake was selling the drugs to his brother who was an addict. Drake's brother was also selling some of what he got, and he sold some to an undercover officer who matched the lot numbers with drugs taken in the hospital pharmacy robbery. Drake was arrested on his way to meet the undercover officer for another sale on November 28, 1982. Drake consented to a search of his pickup truck and house, and a large quantity of drugs from the robbery were found in both. (Drake later would also become an immunized Government witness.)

Drake agreed to wear a body mike to assist

the officers in getting his source. He went to Preston's house later that night and engaged her in conversation. The body mike worked, but the recording device in the police car did not. The officers and Drake recounted that she stated that a "John" was coming over with more drugs and that she would provide them to Drake when the drugs got there.[3]

Drake also returned to the premises about dawn, again wired, to check on the drugs. This time he delivered ampethatimes to Preston while acting as an agent of but without their knowledge.

Later that morning (November 29), the lead officer in the case prepared a search warrant

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3. An officer testified that Drake reported to them that he saw drugs in the house while he was talking to Preston. Drake denies saying he saw drugs in the house. He claims he only told them that he said that assumed there were drugs in shopping bags in the bedroom which he did not look in. The police version of what Drake saw was the basis for the issuance of the search warrant, but both the officer and Drake were affiants. This conflict led to petitioner making a Franks challenge to the search warrant. See note 6, infra.

and affidavit in support. Drake was called off his job to sign the affidavit.[4] The warrant was issued about 11:10 a.m., and the lead officer contacted other police agencies to assist in the search. This was not an anticipatory search warrant because the probable cause dealt with and authorized seizure of the drugs that were allegedly on the premises at the time. See note 3, supra.

It was determined that the search warrant would not be executed until "John" came to Preston's house with the drugs. Surveillance was established all over the neighborhood. The officers had pictures of petitioner and a description of his car, even though the lead officer

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4. There is an unresolved factual dispute over whether Drake ever swore to the affidavit he signed. Drake denies ever having seen the judge who arraigned him before the arraignment. According to the affidavit for the search warrant, Drake appeared before that judge to swear to the facts a few days earlier. Apparently, the officer got Drake to sign it and took it to the magistrate. See note 6, infra. This violates the "Oath or affirmation" requirement of the Fourth Amendment.

said they were only about 90% sure it was petitioner who was coming. They could not say how they knew; it seemed to be only an assumption.

Petitioner arrived at Preston's house about 6:30 p.m., and Preston was in her back yard with her dog. Petitioner parked in the driveway at the back of the house. A surveillance officer testified that he could see a dark bag in petitioner's hand when he got out of the car. It was nighttime.

Petitioner and Preston went inside, and Preston shut the door behind her. She drew the window curtains, and she testified that petitioner got the drugs from his gym bag and put them on the dining room table so they could inventory what they had to give to Drake. After she picked up one or two containers to look at the labels,[5] a knock came at the door. She went to the door and asked who it was.

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5. Curiously, none of petitioner's fingerprints were found on these drugs while they were on the drugs Drake had.

Meanwhile, petitioner was gathering up the drugs and putting them back in the gym bag. The officers at the door identified themselves, and they wanted in. Preston asked if they had a warrant, and they said it was on its way. (For some reason, the warrant was not at the scene of the search contrary to Arkansas law. See note 6, infra.) She said they could not enter without a warrant.

Meanwhile, petitioner had gone to the back door and looked out. He then went into the bathroom. Officers at the rear of the house kicked the door in when petitioner went into the bathroom. An officer testified that petitioner was arrested with the gym bag in hand attempting to climb out the bathroom window. The lot numbers on the drugs in the bag matched those taken in the hospital robbery.

Petitioner and Preston were charged in state court. Later, they were indicted in the district court, and the state charges were dropped.

C. Grounds to Suppress

Petitioner's motion to suppress raised substantial issues concerning the validity of the search warrant and the underlying probable cause.[6] The suppression hearing was bifurcated

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6. The challenge to the merits included: (1) a failure to support the credibility of the informant from the criminal milieu under Illinois v. Gates, 103 S.Ct. 2317 (1983); (2) a material false statement by Drake that drugs were already in the house under Franks v. Delaware, 438 U.S. 154 (1978), based on the omission of that alleged fact from the police reports and also, at trial, Drake contradicted the part of the affidavit that he saw drugs in the house--actually, he assumed they were drugs; (3) Drake's failure to appear before the magistrate based on the fact he said he never saw the judge he was arraigned before, who actually issued the warrant; (4) a failure of particularity in the warrant which did not have the affidavit attached or present, see United States v. Crozier, 674 F.2d 1298, 1299 (9th Cir. 1982) (description of evidence as "material evidence in violation of [drug statute]" overbroad), and Re Application of Lafayette Academy, 610 F.2d 1, 4 (1st Cir.1979) (affidavit may cure overbroad warrant if it is present at search and incorporated into warrant by reference); (5) seizure of things beyond the warrant; and (6) failure to have the warrant in hand when the search began contrary to Ark. R. Crim. P. 13.3(b) (warrant must be furnished before search begins).

Thus, this is not a good faith execption case. United States v. Leon, 104 S.Ct. 3405 (1984).

into separate hearings on standing and the merits. Since petitioner was found to lack standing, the merits of the search have never been litigated.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF A THIRD-PARTY'S STANDING TO CHALLENGE AN ENTRY TO ARREST AND SEARCH THE PREMISES OF ANOTHER FOR HIS PERSON AND EFFECTS IS AN IMPORTANT QUESTION WHICH MUST BE SETTLED BY THIS COURT. ALSO, THE HOLDING BELOW RENDERS A NULLITY PAYTON AND STEAGALD.

A. The question presented for review in this case was left open in Steagald v. United States, 451 U.S. 204, 208-11 (1981), where the Court held that the arrest of a person in the home of another requires a valid search warrant. See also Payton v. New York, 445 U.S. 573 (1980). The petitioner's standing in Steagald was assumed throughout the life of the case until submission in this Court which held that the issue was waived by the Government. Id. at 209-11. The question also seems to have been

left unanswered in McDonald v. United States, 335 U.S. 451 (1948) (decided on other grounds), and United States v. Karo, 104 S.Ct. 3296 (1984) (codefendant in drug lab operation originally held by district court to have no standing as guest; Sixth Circuit reversed; issue not addressed by this Court). Fourth Amendment standing, of course, is a question of whether the defendant has a legitimate expectation of privacy in the place invaded by the police. Rakas v. Illinois, 439 U.S. 128, 140 (1978).

In the years since, the state and federal appellate courts have often come to conflicting results on similar facts. See II, infra.

B. The question of third-party standing to challenge the entry and search of the home or premises of another has a tortured history which needs clarification.

This Court's first encounter with standing was in 1948 in McDonald v. United States, supra. There, government agents looked through McDonald's apartment transom without a

warrant catching McDonald and Washington in the act of totalling the proceeds of a numbers racket. McDonald was ordered to open the door, and he did. While the majority opinion assumed that Washington lacked standing, it still reversed because the illegally seized evidence should have been returned to McDonald. Justice Jackson concurred, id. at 461:

> As to defendant Washington: He was a guest on the premises. He could have no immunity from spying and listening by those rightfully in the house. But even a guest may expect the shelter of the rooftree he is under against criminal intrusion. I should reverse as to both defendants.

Justice Frankfurter joined in that opinion, and Justice Rutledge likely would have, considering his own brief statement. Id. at 456-57.

This Court's first standing case, United States v. Jeffers, 342 U.S 48 (1951), involved a defendant who kept drugs in his aunt's hotel room. He claimed ownership of the drugs and proved a right to use her room. The government claimed he had no privacy interest in the room. This Court held without any explanation

at all that Jeffers "unquestionably had standing to object to the seizure." Id. at 52.

In Jones v. United States, 362 U.S. 257 (1960), the Court recognized "target" or "automatic" standing because it was inconsistent for the Government to argue possession of drugs and lack of standing. The Court said that a person "against whom the search was directed" (id. at 261) or who was "legitimately on the premises" (id. at 267) could challenge a search.

In 1967, the Court adopted the "reasonable expectation of privacy" standard in Katz v. United States, 389 U.S. 347 (1967). The following Term in Mancusi v. DeForte, 392 U.S. 364 (1968), the question of third-party standing in business premises was first cast in terms of an expectation of privacy in the place searched. DeForte shared a large office with others. He was held to have retained a reasonable expectation of privacy in the office.

The following year, pure target standing was rejected in Alderman v. United States, 394 U.S.

165, 174 (1969), with the Court reaffirming that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."

Finally, in Rakas v. Illinois, supra, the Court merged the questions of standing to challenge a search and the reasonable expectation of privacy in the place searched. The "legitimately on the premises" statement of Jones was rejected as "too broad a gauge for measurement of Fourth Amendment rights." Id. at 142. Rakas makes clear, however, that persons need not have any common law "interest" in the place searched to still have a reasonable expectation of privacy there. Id. at 143 & n.12.

The last third-party standing case was United States v. Salvucci, 448 U.S. 83 (1980), which rejected the "automatic standing" rule of Jones and remanded for the taking of more evidence on the standing issue since it had not yet been litigated.

C. Under all of these holdings, petitioner

had a reasonable expectation of privacy in the place searched. The lower courts here denigerated petitioner's connection with the premises in opinions that stressed his prior connection or property law and belittled his present connection and intent and actions designed to keep his affairs private. One's reasonable expectation of privacy should be considered first and foremost at the time of the search and then moving back in time if those factors are not sufficient.

Here, petitioner and Preston were engaged in what the court of appeals found to be "an on-going drug dealing relationship." 761 F.2d at 467. Petitioner was fronting drugs through Preston's house: he would bring them to her and she would sell them to others and return his share of the money to him.

Just prior to the search, petitioner entered Preston's house with a gym bag full of drugs for the purpose of parcelling some out to her. Preston closed and locked the door behind them and she drew the curtains so no one outside

could see in. See United States v. Trickey, 711 F.2d 56 (6th Cir.1983) (covering windows shows expectation of privacy). The drugs were placed on the table for inventorying. Both of them testified that they were in what they believed was a private place. Preston's testimony was more direct: "Q. You were there with Mr. Nabors with the drugs on the table. Did you expect that what you were doing was in private? A. Yes, sir." (S. 95).

The police testimony was that the police had the warrant in hand for seven hours and kept the house under surveillance waiting for petitioner to enter before they conducted the search. The application for the search warrant challenged below alleges that "John" was bringing drugs over later. Whether that was essential to the probable cause finding is problematical. The affidavit was based on the allegation that drugs were already there in Preston's house, and it had to have been made with knowledge of the falsity or at least with reckless

disregard for the truth.

The officers testified they were waiting for petitioner to enter the premises to conduct the search, and they were looking for his car to drive up. In sum, petitioner was clearly, by the Government's conduct and admissions, "a person against whom the search was directed." Jones, supra, at 261. He was as much the object of the search as the drugs allegedly in the house prior to that. This part of Jones is apparently still good law under Rakas under these facts.

D. By all accounts, petitioner was a guest on the premises. Put another way, he was an invitee of the householder for a specific conspiratorial purpose. Once inside, the householder shut and locked the door behind them and she drew the curtains. They believed it was private. Their conduct manifests that both of them "exhibit[ed] an actual (subjective) expectation of privacy" in the premises and that this "expectation [is] one that society is prepared to

recognize as reasonable." See Rakas, supra, at 143-44 n.12; Katz v. United States, supra, at 361 (Harlan, J., concurring). It is, rather, basic to our understandings of the privacy of the home when the householder has guests. Rakas, supra, at 143-44 n.12. See Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (a "normative inquiry" of expectations of privacy is required).

Even a guest has some basic rights of privacy in premises of another. See, e.g., Restatement (Second) of Torts § 652B:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his prvacy, if the intrusion would be highly offensive to a reasonable person.

Maybe more significantly, petitioner's guest relationship to the premises here was sufficient to permit him to use force to prevent an illegal entry under Arkansas law. King v. State, 55 Ark. 604, 19 S.W. 110 (1892); Ark. Stat. Ann. § 41-508 (Repl.1977); Model Penal Code § 3.06

(Official Draft 1980).

We are not dealing with something as narrow as whether petitioner has standing to challenge a search of, for example, Preston's jewelry box or even her bedroom or her bathroom cabinet. Compare United States v. Meyer, 656 F.2d 979 (5th Cir.1981), infra. Rather, his standing applies to a police entry of a house he is lawfully in and to the areas of a house commonly used by guests.

E. The decision below is contrary to the spirit of Payton and Steagald. Under the holding of the courts below, the police will have the right to conduct third-party searches with impunity and have no incentive to comply with the warrant requirement because the person to be arrested and searched for has no standing to complain. Payton and Steagald are thus rendered nullities. Harbaugh & Faust, "Knock on Any Door"--Home Arrests After Payton and Steagald, 86 Dick. L. Rev. 191, 237 (1982). After all, "physical entry of the home is the chief evil against which the wording of the Fourth

Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972); Payton, supra.

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. United States, supra, at 351-52.

Under the holdings of the courts below, the police could knowingly violate one person's rights to catch another and simply forego prosecution of the former if the challenge to the entry succeeds. Where, then, is the incentive for getting search warrants which was so crucial to the adoption of the good faith exception in United States v. Leon, supra?

If Charles Katz had an expectation of privacy in a public telephone booth for the fleeting moment he was there, surely petitioner had an expectation of privacy in a house closed to the public when he was invited in to do something in private.

II. THERE IS NO UNIFORMITY OF DECISION AMONG THE FEDERAL CIRCUITS AND THE STATES ON THE QUESTION PRESENTED FOR REVIEW. THERE IS A CONFLICT OF FOURTH AMENDMENT LAW WHICH MUST BE RESOLVED.

Without specific guidance on this issue, the case law in the federal and state courts is in complete disarray. On substantially similar facts, courts come down on opposite sides of the issue. Even the Eighth Circuit's holdings are not consistent. The slight weight of authority finds a guest has an expectation of privacy and

standing to challenge an entry.

A. Finding an expectation of privacy or standing

1. Post-Rakas cases finding an expectation of privacy of a guest or invitee in the premises of another on similar facts under the Fourth Amendment are, e.g.: United States v. Cassity, 720 F.2d 451 (6th Cir.1983), cert. granted and vacated 104 U.S. 3581, on remand on merits 604 F.Supp. 1566 (E.D.Mich.1985) (guest helping operate a drug lab); United States v. Robertson, 606 F.2d 853 (9th Cir.1979) (guest had interest in premises because he was arrested there); United States v. Cresta, 592 F.Supp. 889 (D.Me.1984) (guests of motel guests had standing); United States v. Lace, 502 F.Supp. 1021, 1041 (D.Vt. 1980), aff'd 669 F.2d 46 (2d Cir.1982), cert. den. 459 U.S. 854; United States v. Blanchard, 504 F.Supp. 95, 98 (S.D. Fla.1980) (guest of motel guests had legitimate expectation of privacy in premises); Commonwealth v. O'Neal, 289 Pa.Super. 238, 429 A.2d

1189, 1190-91 (1981) ("temporary gratuitous guest" had standing); In re Johnny V., 85 Cal. App. 3d 120, 149 Cal. Rptr. 180, 185 (1978) (invited guest in home shortly after crime); People v. Tillery, 99 Cal. App. 3d 975, 160 Cal. Rptr. 650, 652 (1979) (same); People v. Bailey, 60 Ill.App.3d 1046, 18 Ill.Dec. 120, 377 N.E.2d 273, 277 (1978) (warm pursuit to house of one defendant; others were guests who could challenge search, which they lost on merits); Lentini v. State, 406 So.2d 998, 1001 (Ala.Cr.App. 1980), writ denied 406 So.2d 1003 (Ala.1981) (after remand; guests running drug lab); People v. Lewis, 94 A.D.2d 44, 462 N.Y.S.2d 884 (1983).[7]

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7. This asserted standing to challenge an entry of a house to effect an arrest is similar to the recognized standing of a passenger or even a car thief to challenge the stop of a car even though he lacks standing to challenge the search. See, e.g., United States v. Glen-Archila, 677 F.2d 809, 813 n. 6 (11th Cir.1982), cert. den. 459 U.S. 874; Parkhurst v. State, 628 P.2d 1369, 1374-76 (Wyo.1981), cert. den. 454 U.S. 899; State v. Scott, 59 Or. App. 220, 650 P.2d 985, 987; People v. Flowers, 111 Ill.

Being an overnight guest shows an expectation of privacy in the premises[8]; e.g.: United States v. Guerrero, 756 F.2d 1342 (9th Cir.1984) (time of search not specified); United States v. Karo, 710 F.2d 1433 (6th Cir.1983), rev'd on other grounds 104 S.Ct. 3296 (1984) (guest who was working in drug lab); United States v. Torres, 705 F.2d 1287 (11th Cir.1983) (search after second day); United States v. Perez, 700 F.2d 1232, 1236 (8th Cir.1983) (search next day); United States v. Robertson, supra (additional ground in support of holding); Flanagan v. State, 440 So.2d 13, 14 (Fla.App.D1 1983), rev. denied 450 So.2d 486 (Fla.1983) (search before first night over); State v. Matias, 51 Hawaii 62, 451 P.2d 257, 259-60 (1969); State v. Allen, 9 Ariz.App. 196, 450 P.2d 708, 711 (1969).

(note 7, cont,) App. 3d 348, 67 Ill Dec 203, 444 N.E.2d 242, 246 (1982); State v. Conger, 183 Conn. 386, 439 A.2d 381 (1981).

8. Contra: United States v. Maxwell, 753 F.2d 1301 (5th Cir.1985), pet. for cert. pending, No. 84-1878 (factually similar to Jones but reaching opposite result under Rakas).

2. Pre-Rakas cases finding Fourth Amendment standing of a guest or invitee are, e.g.: United States v. Lindsay, 165 U.S. App. D.C. 105, 506 F.2d 166, 170 (1974) (guest of motel guest had standing to challenge a search of motel room because he was in it at time); United States v. Scheffer, 463 F.2d 567 (5th Cir.1972), cert. den. 409 U.S. 984; United States ex rel. Rosner v. Commissioner, New York State Dept. of Correction, 421 F.Supp. 781 (S.D.N.Y.1976) (guest of hotel guest); Gonzales v. Beto, 266 F.Supp. 751 (W.D.Tex.1967), aff'd 388 F.2d 145 (5th Cir.) (guest in house); Banks v. Pepersack, 244 F.Supp. 675 (D.Md. 1965) (guest in house); State v. Simms, 10 Wash. App. 75, 516 P.2d 1088, 1091 (1973); Stucker v. State, 493 P.2d 84, 88-89 (Okl.Cr. 1972); Ward v. United States, 365 A.2d 378, 380 (D.C.App.1976); People v. Brown, 34 A.D.2d 108, 309 N.Y.S.2d 531, 533 (1970); Belton v. State, 228 Md. 17, 178 A.2d 409, 412 (1962).

B. Finding NO expectation of privacy or standing

1. Post-Rakas cases not finding an expectation of privacy of a guest or invitee on the premises of another are, e.g.: United States v. Adamo, 742 F.2d 927, 947 (6th Cir.1984), cert. denied 105 S.Ct. 971 (guest at party; no standing as to house to challenge his arrest inside it); United States v. Rackley, 742 F.2d 1266, 1270 (5th Cir.1984) ("mere guest" has no standing); United States v. Robinson, 225 U.S. App. D.C. 282, 698 F.2d 448, 454 (1983) (guest; many people had access to premises at the time); United States v. Briones-Garza, 680 F.2d 417, 422-23 (5th Cir.1982), cert. denied 459 U.S. 916 (illegal alien in house used as a "drop house" had no reasonable expectation of privacy in it because of the sheer numbers of people moving through it); People v. Carter, 341 N.W.2d 128 (Mich.App.1983) ("mere transient visitor"; no standing); Clapp v. State, 639 S.W.2d 949, 953 (Tex.Cr.App.1982) (per McCormick, J., with two judges concurring in result) (guest of motel

guest); State v. Mallory, 409 So.2d 1222, 1223-24 (Fla.App.D2 1982); Neely v. State, 159 Ga. App. 737, 285 S.E.2d 190, 191 (1981) (overnight guest).

2. Pre-Rakas cases not finding standing in a guest or invitee, e.g.: United States v. Epperson, 528 F.2d 48, 49 (9th Cir.1975); Etchieson v. State, 361 S.W.2d 711, 712 (Tex.Cr.App. 1962) (must be in possession of premises).

3. Cases finding no standing because of the intensity of the search (not necessarily in conflict here because of obvious limits on the expectation of privacy in the place searched) United States v. Meyer, 656 F.2d 979, 980-81 (5th Cir. 1981) (guest had no expectation of privacy in search of bathroom cabinet he did not use).

C. Between Jones and Rakas, courts were more inclined to find standing under Jones' "legitimately on the premises" standard. After Rakas, courts undertook "expectation analysis" to at least weigh facts and circumstances to

determine whether there was a legitimate expectation of privacy in a guest. Nevertheless, courts still disagreed on similar facts on the question of whether a guest had standing to challenge an entry and, to what extent, a search under Rakas. Obviously, then, Rakas does not provide any easy answer to this question.

D. Also, a line of cases is developing recognizing a limited form of "co-conspirator standing" where the objects and circumstances of the conspiratorial agreement define the scope of the legitimate expectation of privacy and find one in the property of another because of the nature of the agreement. See, e.g., United States v. Perez, 689 F.2d 1336, 1339 (9th Cir. 1982) (agreement for the transportation of contraband under watchful eye of other conspirators gives them all standing to search a truck only one was driving); United States v. Johns, 707 F.2d 1083, 1099-100 (9th Cir.1983), rev'd on other grounds 105 S.Ct. 881 (1985) (pilots who

dropped marijuana at a remote airstrip had standing to challenge the search of the ground crew's trucks because the members of the ground crew were bailees of the pilots); United States v. Little, 735 F.2d 1049, 1052 (8th Cir. 1984), on rehearing on other grounds, 743 F.2d 1261 (8th Cir.), cert. denied 105 S.Ct. 1196 (lessors of plane for conspiracy to import drugs who had not even taken possession of the plane had standing to challenge an illegal entry); United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984) (joint control through conspiracy); United States v. Bailey, 628 F.2d 938 (6th Cir. 1980) (co-conspirator had expectation of privacy in apartment storage room of another).

These cases also support petitioner's contention he had a legitimate expectation of privacy at the time in question.

E. This case presents an opportunity to eliminate these conflicts and explain how Rakas and the expectation of privacy standard applies

to guests on the premises of another when the guest and his belongings are the objects of the entry and search.

C O N C L U S I O N

For all of the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1386-EA September Term, 1984

UNITED STATES OF AMERICA,

Appellee,

vs. Appeal from the United States District Court for the Eastern District of Arkansas

JOHN CALVIN NABORS, JR.,

Appellant.

Submitted: Nov. 12, 1984

Decided: May 6, 1985

Before BRIGHT, McMILLAN and BOWMAN, Circuit Judges.

McMILLAN, Circuit Judge.

John Calvin Nabors appeals from a final

judgment entered in the District Court[1] for the Eastern District of Arkansas upon a jury verdict finding him guilty of conspiracy to possess with intent to distribute and to distribute meperidine in violation of 21 U.S.C. § 846, distribution of meperidine in violation of 21 U.S.C. § 841(a)(1), and possession with intent to distribute hydromorphone, meperidine, methadone, and secobarbital in violation of 21 U.S.C. § 841(a)(1). Appellant was sentenced to a total of twenty years imprisonment, followed by five years of special parole and fined $15,000. For reversal appellant argues that the district court erred in (1) finding that appellant lacked a legitimate expectation of privacy in Gena Preston's house, (2) failing to grant appellant's motion for a new trial because of prosecutorial misconduct during closing argument, and (3) admitting evidence of other crimes. For the reasons discussed below,

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1. The Honorable George Howard, Jr., United States District Judge for the Eastern and Western Districts of Arkansas.

we affirm.

The facts can be summarized as follows keeping in mind that the evidence must be construed in the light most favorable to the jury verdict. Hamling v. United States, 418 U.S. 87 (1974).

A hospital pharmacy in North Little Rock, Arkansas, was robbed on November 22, 1982, at approximately 9:30 p.m., by two or three armed assailants wearing dark colored jumpsuits and ski masks. The assailants forcibly gained entrance to the pharmacy and then forced open the locked door to the room where most of the pharmacy's controlled substances were kept. Although a staff pharmacist triggered the alarm system during the robbery, the system did not function because the telephone lines had been cut.

An inventory of the hospital pharmacy made the morning following the robbery revealed that a variety of controlled substances had been taken during the robbery, including meperidine, hydromorphone, methadone, and secobarbital.

Shortly after the time of the robbery, on November 22, 1982, appellant visited Gena Preston at her home in Little Rock, Arkansas. Preston testified that during that visit appellant asked her if she had ever tried pure pharmaceutical cocaine, one of the substances taken from the pharmacy that night. Appellant then produced a small brown bottle containing cocaine.

After using the cocaine, appellant and Preston discussed the delivery of additional drugs. Appellant and Preston had an on-going drug dealing relationship. Appellant supplied drugs to Preston who then sold the drugs to John Drake.

On the afternoon following the robbery, appellant and Preston drove to the home of appellant's father in Little Rock. Preston waited in the car while appellant went inside. Appellant returned to the car carrying a tote bag containing approximately eighty boxes of meperidine which he placed on the floor near Preston's feet. Each box contained ten syringes of a

premeasured dose of the drug. Preston, who was to sell the drugs for appellant, took the drugs back to her home and hid them. She subsequently sold the meperidine to her brother and to John Drake.

On Sunday evening, November 28, 1982, John Drake removed some boxes of meperidine from a hiding place in his home and placed them in his shaving kit which he then hid in the tool box of his truck. Drake and his family then went to visit his wife's sister. On the way Drake was stopped by North Little Rock and Sherwood police officers. Drake consented to the search of his truck that resulted in the discovery of the drugs hidden in his tool box. Appellant's fingerprints were found on these drugs and other drugs found in Drake's house pursuant to a consent search. After being advised of his rights, Drake told the officers that he had obtained the drugs from Preston. He also informed the police that Preston received the drugs from a man named "John," but that he

could not identify the man because he had seen him once only for a moment. Drake agreed to cooperate with the police.

On the night following his arrest, Drake went to Preston's house wearing a body wire. In Preston's house Drake observed a paper sack containing boxes of meperidine. Preston refused to give Drake the drugs, however, because Drake had not paid for the other drugs she had given him previously and Drake had not brought money with him. As instructed by the police, Drake told Preston that he would pay her what he owed her and would pay her in cash if she could arrange to have all the remaining drugs brought to her house. Preston agreed to contact "John" and have the drugs delivered to her house.

At approximately 5:00 p.m. on Monday, November 29, 1982, Drake received a telephone call from Preston informing him that she expected "John" to deliver the remaining drugs to her house that afternoon, but that he had not yet

arrived. Preston asked Drake to come to her house with his money. He agreed.

Meanwhile, the investigating officers commenced surveillance of Preston's house following the application and receipt of a state search warrant for Preston's house. At approximately 6:20 p.m. on November 29, 1982, an officer on the surveillance team observed appellant drive into Preston's driveway and walk toward the back of Preston's house, carrying a dark colored athletic bag in one hand. The surveillance officer notified the surveillance team of appellant's arrival.

Preston was waiting on the back porch of her house when appellant arrived. Preston testified that appellant told her that he intended to spend the night at her house. Preston and appellant entered the house locking the back door behind them. Preston drew the window shades in the dining room and then she and appellant began to inventory the drugs inside the athletic bag. Shortly thereafter, someone

knocked on the front door. Preston answered the door while appellant gathered the drugs and placed them in the athletic bag.

To warn appellant that the police were knocking, she asked loudly whether the police had a search warrant. The police told Preston that the warrant was on the way, but she said that they could not enter until they produced the warrant. Nevertheless, the police entered the back of the house and arrested appellant while he was trying to escape through a bathroom window with the open athletic bag filled with pharmaceutical drugs.

Appellant and Preston were indicted on several drug related charges. Preston agreed to testify on behalf of the government in exchange for immunity from prosecution. Appellant was convicted by a jury on January 21, 1984. It is from that conviction that appellant now appeals.

Legitimate Expectation of Privacy

Appellant argues that the district court

erred in denying appellant's motion to suppress evidence seized by the government during a search of Gena Preston's house on November 29, 1982, pursuant to a search warrant. The government argues that the district court was correct in finding that appellant's fourth amendment rights were not violated because appellant did not possess a reasonable or legitimate expectation of privacy in Preston's house on the day of the challenged search.

A person challenging the constitutionality of a search must demonstrate that he or she possessed a legitimate expectation of privacy in the particular area searched. Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (Rakas). That fourth amendment rights are personal and may not be vicariously asserted is clear. See United States v. Payner, 447 U.S. 727, 731 (1980). The Supreme Court has indicated that a "casual visitor" to a house does not possess a legitimate expectation of privacy sufficient to challenge the

search of a room to which he or she has never been or in which he or she only arrived a minute before the search commenced. See United States v. Perez, 700 F.2d 1232, 1236 (8th Cir.1983), citing Rakas, 439 U.S. at 142. Several courts have determined that a guest in another's home can possess a legitimate expectation of privacy thus permitting the guest the right to challenge the search of the host's home, thereby distinguishing such a guest from the "casual visitor" in Rakas. See United States v. Torres, 705 F.2d 1287, 1295 (11th Cir.1983); United States v. Perez, 700 F.2d at 1236; United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir.1981) (Haydel); United States v. Robertson, 606 F.2d 853, 858 n.2 (9th Cir.1979). In each of these cases there were present several factors relevant to the determination whether a guest possesses a legitimate expectation of privacy in his host's home that are absent in the present case. In United States v. Haydel, 649 F.2d at 1155, the Fifth Circuit relied on tne following

factors in concluding that the defendant possessed a legitimate expectation of privacy in his parents' home: (1) the defendant's parents gave him a key to their home, thereby providing him with virtually unencumbered access; (2) the defendant stored clothing at his parents' home and occasionally remained there overnight; (3) the defendant conducted a significant portion of his gambling activities at his parents' home and he owned the records seized; (4) the defendant apparently possessed the ability to exclude others from his parents' home; and (5) the defendant exhibited a subjective expectation that the contents of the box stored under his parents' bed were to remain private.

In United States v. Rackley, 742 F.2d 1266, 1270 (11th Cir.1984), the Eleventh Circuit stated that although there was testimony that the appellant in Rackley possessed a key to his host's home and stayed overnight there several times, he did not stay in the house immediately preceding the search and did not keep a full

wardrobe in the house when he was there. Based on those facts, the court held that if the appellant possessed an expectation of privacy, it was limited to the guest bedroom and, because no evidence was seized in the guest bedroom, his expectation of privacy in the guest bedroom was of no legal consequences. Id. Other courts have found that guests in varying factual situations had no expectation of privacy in their host's home. See, e.g., United States v. Adamo, 742 F.2d 927, 947 (6th Cir.1984) (guest at a birthday party had no expectation of privacy in host's home), cert. denied, 105 S.Ct. 971 (1985); United States v. Robinson, 698 F2d 448, 454-55 (D.C.Cir.1983) (guest in home where other people freely entered failed to demonstrate legitimate expectation of privacy); United States v. Briones-Garza, 680 F.2d 417, 422-23 (5th Cir.) (illegal alien who resided in a house used as a "way station" for smuggling Mexicans into the United States did not have a reasonable expectation of privacy), cert. denied, 459 U.S.

916 (1982); United States v. Meyer, 656 F.2d 979, 981-82 (5th Cir.1981) (guests who did not have a key to host's home, left no personal belongings there, and did not enjoy unencumbered access did not possess a legitimate expectation of privacy).

In the present case appellant did not have a key nor did he have unencumbered access to Preston's house. Appellant did not have permission to go into Preston's home when she was not there. In fact, she instructed appellant not to visit her without calling. Although appellant visited Preston two or three days a week from June 1982 through November 1982, appellant never spent the entire night there. Appellant did not receive mail or keep any personal belongings at Preston's home. Appellant was at Preston's home only a short time before the police arrived with a warrant to search the premises. Furthermore, appellant never claimed ownership of the drugs seized from his possession at Preston's home on November 29, 1982.

Finally, although appellant argues that he obviously intended the drug transaction to remain private, "the subjective expectation of not being discovered conducting criminal activities is insufficient to create a legitimate expectation of privacy." United States v. Meyer, 656 F.2d at 982, citing Rakas, 439 U.S. at 143044 n. 12. See also Oliver v. United States, 104 S.Ct. 1735, 1743 n.13 (1984) ("Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post no trespassing signs."). We hold, therefore, that the district court did not err in finding that appellant failed to establish that he had a legitimate expectation of privacy in Preston's home on the date of the challenged search.

Prosecutorial Misconduct

Appellant argues that statements made by the prosecution during closing argument prejudiced appellant before the jury, thus depriving

him of his right to a fair trial. Appellant argues that the prosecution accused defense counsel of misstating the evidence and invoked God on the side of the prosecution. The government argues that the issue has not been preserved for appellate review because appellant failed to object to the comments during closing argument, request a curative instruction or make a motion for a mistrial because of the comments. The government argues, therefore, that the proper standard of review is plain error and that the prosecution's comments during closing argument did not constitute plain error. The government argues that its closing argument was a fair comment on and in reply to the points raised by defense counsel's closing argument.

This court has often rebuked prosecutors for improper statements made during closing arguments. See United States v. Harvey, 756 F.2d 636, 646-49 (8th Cir.1985) and citations contained therein. However, the district court is vested with broad discretion in controlling

closing arguments. Id.; United States v. Llach, 739 F.2d 1322, 1330 (8th Cir.1984); United States v. Michaels, 726 F.2d 1307, 1315 (8th Cir.), cert. denied, 105 S.Ct. 92 (1984). If an arguably improper statement made during closing argument is not objected to by defense counsel, this court will only reverse under exceptional circumstances. Fed.R.Crim.P. 52(b).

In the present case appellant failed to object to the arguably improper comments. In its general instructions, the district court carefully cautioned the jury that the attorneys' arguments were not evidence and that they should consider only the evidence in arriving at their verdict. See United States v. Harvey, 756 F.2d at 649. Furthermore, the evidence in this case was substantial. When viewed in the light of the entire trial, the prosecutor's statements clearly did not constitute plain error.

Evidence of Other Crimes

Appellant challenges the district court's

decision to admit evidence of appellant's participation in two hospital pharmacy robberies, arguing that the government failed to adequately prove appellant's participation in the other crimes and the prejudicial effect of this evidence outweighed its probative value.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that his or her conduct on a particular occasion was in conformity with it. However, evidence of prior conduct which may constitute a separate crime may be offered to prove motive, intent, opportunity, knowledge, preparation, common scheme or plan, identity, or absence of mistake or accident. Fed.R.Evid. 404(b). E.g., United States v. Llach, 739 F.2d at 1327. Before evidence of other crimes may be admitted, the following prerequisites must be established:

> (1) the evidence of the other act must be relevant to a material issue; (2) the other act must be similar in kind and reasonably close in time to the crime charged; (3) the

> evidence of the other act must be clear and convincing; and (4) the probative value of the evidence must not be outweighed by its prejudice.

Id., citing United States v. Miller, 725 F.2d 462, 466 (8th Cir.1984). If the district court finds that the admissibility requirements of Fed.R.Evid. 404(b) have been satisfied, then a cautionary instruction to the jury should be given. United States v. Llach, 739 F.2d at 1327. Finally, the court will not reverse the district court's decision to admit other crimes evidence under Fed.R.Evid. 404(b) absent a showing of an abuse of discretion. Id.; United States v. Boykin, 679 F.2d 1240, 1244 (85h Cir.1982).

In the present case the evidence concerning the robberies of Riverview Hospital Pharmacy on September 18, 1982, and Memorial Hospital Pharmacy on November 22, 1982, were offered to prove intent, design, plan, and motive. Appellant does not dispute that the first two requirements of admissibility under Fed.R.Evid. 404(b) have been satisfied. Nor does appellant argue

that the district court failed to give the appropriate cautionary instruction. Specifically, appellant argues that the government failed to prove the other crime by clear and convincing evidence and that the prejudicial impact of this evidence outweighed its probative value.

Preston testified that appellant told her that he and two others had participated in the robbery of Memorial Hospital on November 22, 1982. "Direct testimony of the defendant's participation in the prior transaction is sufficient to meet the clear and convincing standard." United States v. Llach, 739 F.2d at 1327, citing United States v. Evans, 697 F.2d 240, 248 (8th Cir.), cert. denied, 460 U.S. 1086 (1983). Gena Preston also testified that on September 18, 1982, the same day as the robbery of Riverview Hospital Pharmacy, appellant and two other men came to her house with a duffle bag filled with pharmaceutical drugs. She testified that she observed appellant and the two other men as they inventoried the drugs contained in the duffle bag on

September 18, 1982. Appellant has not demonstrated that the district court abused its discretion in concluding that there was clear and convincing evidence that appellant participated in the two hospital pharmacy robberies.

Finally, the district court made a specific finding that the prejudicial effect of this evidence was outweighed by its probative value. The district court has broad discretion in determining whether the probative value of other crimes evidence is outweighed by its prejudicial impact. See United States v. Miller, 725 F.2d at 466. The district court carefully instructed the jury at the time the evidence was admitted about the narrow purpose for which this evidence was admitted. We hold, therefore, that the district court did not abuse its discretion in admitting the evidence of other crimes under Fed. R. Evid. 404(b).

Accordingly, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1386-EA September Term, 1984

UNITED STATES OF AMERICA,

Appellee,

vs. Appeal from the United States District Court for the Eastern District of Arkansas

JOHN CALVIN NABORS, JR.,

Appellant.

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

June 18, 1985

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. LR-CR-83-59(1)

JOHN CALVIN NABORS, JR. DEFENDANT

ORDER

Currently pending is defendant's motion to suppress evidence obtained from a private residence known as 2401 South Cedar Street, North Little Rock, Arkansas, on November 29, 1982, pursuant to a search conducted by police who possessed a search warrant issued by the Municipal Judge of North Little Rock.

The crucial issue to be determined is:

1. Whether defendant Nabors has standing to challenge the search and seizure of contraband at 2401 South Cedar Street, North Little Rock, Arkansas.

The Court, after carefully evaluating the evidence, including exhibits introduced, determines that defendant does not have standing to

challenge the search and seizure made at 2401 South Cedar Street; and that the delay of approximately seven hours by the North Little Rock police in executing the search warrant is not fatal to search and seizures made. This determination by the Court is based upon the following findings:

1. Gena Dene Preston was the sole occupant and the one person in possession and control of the private residence described as 2401 South Cedar Street, North Little Rock, Arkansas, on the 29th day of November, 1982. That defendant John Calvin Nabors, Jr., possessed no proprietary interest in or to the property, nor any other interest of any type, kind or nature.

2. That while John Calvin Nabors, Jr., was a personal and close friend of Ms. Preston and visited her frequently at the aforementioned address at the approximate time and dates that she designated, Mr. Nabors resides and regarded as his personal residence Route 1, Woodson, Arkansas, where he had a wife and all of his

personal effects, including clothing, jewelry, financial records and furniture, were located and maintained. That he visited Ms. Preston at night "whenever he could assure Mrs. Nabors that he had legitimate business transactions which required his absence from home."

3. That John Calvin Nabors, Jr., has failed to demonstrate that he had a reasonable or legitimate expectation of privacy at the residence of 2401 South Cedar Street, North Little Rock, Arkansas, during the search and seizure conducted by North Little Rock police on November 29, 1982.

4. Nabors also argues the violation of his Fourth Amendment rights, as applicable in the instant case under the Fourteenth Amendment, when North Little Rock police searched and seized a bag, in his possession, containing contraband - a quantity of drugs purportedly taken during a robbery of the Memorial Hospital of North Little Rock. The Court finds that Nabors has not demonstrated that he had a reasonable

or legitimate expectation of freedom from governmental intrusion involving the bag in his possession that contained a quantity of stolen drugs. Moreover, it is plain that Nabors, at the time of the seizure of the bag, lacked the requisite expectation of privacy in the area he was standing and which was the place described in the search warrant to be searched.

5. Relative to the execution of the search warrant approximately seven hours after its execution by the Magistrate, Sergeant Johnson of the North Little Rock Police Department testified that an informant, John William Drake, went to the resident of Gena Preston, 2401 South Cedar, sometime prior to the search, with a body mike attached to his person; and that investigating officers overheard a conversation to the effect that one John would bring a quantity of drugs to the residence of Gena Preston on November 29, 1982; that the police delayed the execution of the search in order to apprehend not only the drugs, purportedly at the residence of Gena

Preston, but the quantity of drugs that John was to deliver to that address. Aside from a finding of lack of standing to challenge the delay in executing the warrant, the Court is of the further view that it has not been demonstrated that the delay was unreasonable in any way or contravenes in any respect either state or federal law. On the face of the search warrant appears the following language:

> This warrant shall be executed within ten (10) days of issuance.

The warrant was executed on November 29, 1982.

Rule 13.2(c) of Arkansas Rules of Criminal Procedure provides:

> Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days.

Accordingly, defendant's motion to suppress is denied in all things.

IT IS SO ORDERED this 15th day of November, 1983.

George Howard, Jr.
UNITED STATES DISTRICT JUDGE